



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 969 OF 2011**

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS**  
.....CLAIMANT

**-VERSUS-**

**GILANIS SUPERMARKET LIMITED.....**  
.....RESPONDENT

**Mr. Atella for the Claimant**

**Mr. Ambenge for the Respondent**

**JUDGMENT**

1. This is a recognition dispute between the claimant union and the Respondent employer in terms of *Section 54(1)* of the *Labour Relations Act, 2007*.
2. It is common cause that the parties have no recognition agreement between them. However, the Respondent deducts union dues from its employees in terms of check-off lists submitted by the Claimant union.
3. The issue in dispute is whether the Claimant union has attained the threshold members of 50 + 1 of all the unionisable employee of the Respondent to warrant recognition by the Respondent as the sole union representative of the unionisable employees.
4. Following the filing of this suit, the Court ordered a ballot to be conducted at the shop floor to determine the extent of membership to the claimant union of all the unionisable employees of the Respondent.

**Balloting**

**Claimant's submissions**

5. Balloting was ordered on 7<sup>th</sup> November, 2011 to take place on 1<sup>st</sup> December, 2011. A report dated 2<sup>nd</sup> December, 2011 was filed in Court on 8<sup>th</sup> December, 2011 by the Principal Labour Officer (Rift Valley) and it shows the following result:-

For the union (Yes)                      -        462 votes

Against the union (No) - 239 votes

Spoilt votes - 14 votes

6. According to Mr. J.N. Mwanzia, the Principal Labour Officer, Rift Valley the 'Yes' Vote represented 65.9% of the total votes cast while the 'No' Vote represented 34.09 percent.

The official also noted,

*"The total votes cast were more than total number of employees as per October payroll, including the employees whose names were yet to be posted in the payroll.*

*This may be attributed to the incomplete payroll register used for the voting purpose, the consensus decision to include employees on rest days, off, leave and sick-off and time constraints arising from the early picking by employees."*

7. The Claimant submits that the report represents the true status of its membership at the shop floor and that the court should grant this union recognition.

### **Respondent's submissions**

8. The Respondent disputes the outcome of the Ballot as follows;

(a) The record presented by the Respondent shows the total number of employees in each month from January, 2009 (393 employees) to October, 2011(443) employees.

(b) The record presented before Court by the Respondent also shows that on the voting day the total number of employees in the Respondent's employment was 439 That this included employees on off-duty, leave, sick leave, out of town and management staff. These records included, the Master Roll records(App.12); NSSF record (App.13), letter for NHIF record (App.15 & 16), certified Audit report for the Respondent (App.17) and Kenya National Bureau of statistics returns for 4<sup>th</sup> October, 2011 (App.18).

9. The Respondent submits that these documents present indisputable prove that there were 439 employees on the voting day.

10. It is therefore clear that the results of the ballot were fraudulent as the report indicated 715 employees cast their votes.

11. The Respondent further submits that out of the total 439 employees of the Respondent on the voting day, 36 were absent for various reasons as per (App.19) and 22 were management staff. Therefore only 381 employees were present and eligible to vote on the material day.

12. The Respondent urges the Court to reject these fictitious results union members. The result should not therefore be relied upon as proof of 50 + 1% membership of the unionisable employees of the Respondent.

### **Determination**

13. The court has no documentation to contradict the various documentary evidence which shows that the entire employee complement on the voting day was about 439 employees.

14. The balloting results, which indicate that the union members who voted 'Yes' were 462 and therefore in excess of the entire employee compliment of the Respondent cannot be accepted by the court.

15. Furthermore, the ballot results show that the Respondent had almost doubled the number of

employees (715) to those reflected in the Respondents official documentation which include the Payroll, NSSF and NHIF records and the Audit report.

16. Again, this result is unacceptable to the court since the claimant= has presented no documentary evidence to counter that presented by the Respondent.

17. It is the Court's considered view that the balloting exercise was completely flawed and the Court cannot rely on the result submitted to find that the Claimant union has satisfied the requirements of **Section 54(1)** of the **Labour Relations Act, 2007** by attaining a simple majority of all the unionisable employees of the Respondent as its members.

18. This being the factual situation, the Court need not go any further and finds that the Application by the Claimant union is dismissed for want of proof on a balance of probabilities.

The Claimant union to pay the costs of the suit.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of December, 2014.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**